87-139

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY & BOROUGH OF SITKA,

Petitioner,

v.

R.W. BECK AND ASSOCIATES, PAUL T. CARSON, DPIC COMPANIES, and AMERICAN MOTORISTS INSURANCE COMPANY (KEMPER GROUP),

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals exceed its appellate jurisdiction by making a finding on a dispositive issue of fact, especially where such factual issue was expressly not addressed by the District Court?

2. Did the Ninth Circuit Court of Appeals err in its application of the law of the State of Alaska?

3. Does the Ninth Circuit Court of Appeals' unique *de novo* standard of review of a District Court's interpretation and application of the law of the state in which it sits impinge on due process in that it increases the risk of misapplication of state law in federal court without providing an offsetting benefit?

PARTIES TO THE PROCEEDINGS

The Petitioner is the City and Borough of Sitka, Alaska. The Respondents are R.W. Beck and Associates, Paul T. Carson, DPIC Companies, and American Motorists Insurance Company (Kemper Group).

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The City & Borough of Sitka, by and through its attorneys, Camarot, Sandberg and Smith, hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, (App. C. at 13a), is published.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals, (App. D. at 17a), was filed and entered on February

26, 1987. The decision of the Ninth Circuit Court of Appeals denying Sitka's Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc, (App. A. at 1a), was filed on April 23, 1987. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This is a declaratory judgment action seeking, *inter alia*, interpretation of two indemnity provisions of a professional services agreement. In January, 1983, the City and Borough of Sitka, Alaska ("Sitka"), contracted with R. W. Beck & Associates ("Beck"), a consulting engineering firm, to perform remedial work and federally mandated safety inspections on the Blue Lake hydroelectric dam near Sitka. Sitka is a community of approximately 8,000 located in southeast Alaska. The "Professional Services Agreement" provided:

> The Engineer will provide consulting engineering services in relation to work required to remedy deficiencies at the Project which were identified during the five year [Federal] Safety Inspections performed in 1974 and 1979, and will perform aspects of inspection which could not be performed previously as a result of the deficiencies . . . .

(App. E. at 41a).

Because the contract necessitated underwater work for which Beck was not qualified, Sitka agreed to engage an independent diving contractor, McKinley

Nicholas, d/b/a Alaska Aquatic Dive Center, Inc., to perform the work at Beck's direction.

On April 20, 1983, Nicholas, under Beck's supervision, made a dive at Blue Lake dam to survey the extent of debris around the intake gate and to search for leakage into the intake. If the source of leakage into the intake could be found, Nicholas was to return and caulk the leaks to the extent practicable so that the intake could be dewatered for Beck's safety inspection work. Tragically, the intake gate was open and Nicholas was sucked into the penstock and died. Shortly thereafter Nicholas' estate and widow filed a civil action for wrongful death against Sitka, Beck and Paul W. Carson, the Beck engineer who supervised Nicholas' dive.

The contract between Sitka and Beck contains two hold harmless provisions. The "Standard Provisions" indemnity clause, Part III, Paragraph III.F., provides that Beck will hold Sitka harmless. (App. E. at 35a). The Standard Provisions indemnity clause reflects the ordinary practice of the construction industry wherein the party contracting to do work agrees to hold the owner harmless for liability arising out of the contractor's negligence. The "Special Provisions" indemnity clause, Part IV, Paragraph B.2., provides that as to the performance of "Safety Inspections Work Only," Sitka, under certain circumstances, will hold Beck harmless. (App. E. at 39a). The Special Provisions indemnity clause was added by the parties to limit Beck's liability for engineering errors and omissions in its safety inspection work.

After the wrongful death action was filed in state court, Sitka and Beck each tendered its defense to the other pursuant to the hold harmless clause most

favorable to its position. When Sitka refused Beck's tender, Beck brought this declaratory action in federal court relying on that court's diversity jurisdiction.

The state wrongful death action was tried to a jury during September, 1984. On September 26, 1984, judgment was returned for plaintiffs. Liability was apportioned: Nicholas -- 10%, Sitka -- 50%, Beck and Carson -- 40%. The jury award of $3,375,000 was reduced by remittitur to a final judgment in the principal amount of $2,835,500.

Following entry of judgment in state court, Beck and Sitka filed cross motions for summary judgment in the federal declaratory action, each seeking contractual indemnity for losses arising from the death of McKinley Nicholas. With interest, costs and attorney's fees, the amount in controversy as of the end of June, 1987, was approximately $4,300,000, with interest accruing at the rate of about $1,070 per day. The motions required the District Court to interpret and apply the two indemnity provisions of the Professional Services Agreement between Sitka and Beck.

On April 7, 1986, the District Court issued a 17 page order holding that Sitka was entitled to indemnification from Beck. (App. D. at 17a). Applying the principles of contract construction set forth by the Alaska Supreme Court in *Craig Taylor Equipment v. Pettibone Corp.*, 659 P.2d 594, 597 (Alaska 1983), the District Court held that the "Standard Provisions" indemnity clause requiring Beck to indemnify Sitka applied to the circumstances presented by Nicholas' death. The court held that the "Special Provisions" indemnity clause, which required Sitka to indemnify Beck, was intended solely to protect Beck from catastrophic loss arising out of engineering errors and

omissions on the part of Beck in performing the federally mandated safety inspections. Therefore, Nicholas' death was "not the *kind of claim* to which the terms of the special provisions, taken as a whole, were intended to have application." (App. D. at 25a) (emphasis added).

Accordingly, after considering the contract as a whole and the objects sought to be accomplished, the District Court concluded:

> [I]t is very clear from the provisions of Paragraph B.1 that the scope of the pertinent special provisions was not *all* claims arising from safety inspection work, but rather a limited category of such claims. Plainly the parties in Paragraph B.1 intended to address the horrendous risks attendant to analyzing and offering opinions as to the safety, integrity, and stability of dams such as that which is a part of the Blue Lake project. But for the special provisions . . . . , the entirety of such losses would be upon Beck by virtue of the operation of [the general provisions indemnity clause] if the claim and loss were the result of Beck's sole negligence. Understandably, Beck was unwilling to assume the risk of catastrophic losses should the dam fail on account of a condition which it alone, in the application of generally accepted engineering practices, ought to have discovered and reported. Thus it is that Paragraph B.2 of the special provisions recognizes Beck's legal liability for the rendering of services "in accordance with generally-accepted engineering practices." However, in apportion-

> ing risks, the parties expressly agreed that "such liability", that is, Beck's losses deriving from a breach of the duty to report based upon "generally-accepted engineering practices," would be restricted to the amount of its compensation. Paragraph IV.B.2.
>
> It is abundantly clear that the death of McKinley Nicholas was not the result of a failure of Beck to apply generally accepted engineering practices in analyzing or formulating opinions as to the integrity of the project in question. Indeed, the work of the decedent was obviously preliminary to such analysis and opinion formation. The death of McKinley Nicholas is simply not the kind of claim to which the terms of the special provisions, taken as a whole, were intended to have application. . . . As to this aspect of the case, there are no issues of material fact.

(App. D. at 24a-25a) (emphasis original).

Because the Court found that Nicholas' death was not the *kind of claim* to which the Special Provisions applied, the court expressly refrained from deciding whether, at the time of his death, Nicholas was performing "safety inspection work" for the purpose of invoking the Special Provisions indemnity clause. Because the Standard Provisions applied to Nicholas' death, the District Court granted Sitka's motion for summary judgment.

Beck appealed the District Court's final order to the Ninth Circuit Court of Appeals. According to its practice, the Ninth Circuit Court of Appeals reviewed the grant of summary judgment *de novo* to determine

whether any genuine issue of material fact remained preventing summary judgment, and whether substantive law was correctly applied.

On February 26, 1987, the Court of Appeals issued a short memorandum opinion. (App. C. at 13a). In that opinion it not only reversed the District Court's grant of summary judgment to Sitka, it granted summary judgment to Beck. The Court of Appeals grounded its award of summary judgment to Beck on its holding that the special provisions indemnity clause applied to *all* negligence arising out of safety inspection work, not just negligence arising out of Beck's failure to apply generally accepted engineering practices as held by the District Court. It also grounded its grant of summary judgment on its holding, with regard to a factual issue, that Nicholas was performing "safety inspection work" at the time of his death.

The Special Provisions relating to indemnity consists of two sub-paragraphs; paragraph B.1. is entitled "*Scope*", paragraph B.2., "*Indemnity.*" (App. E. at 39a-40a). Whereas, the District Court, as required by Alaska law, construed the paragraphs together to limit Beck's liability only in connection with the safety, integrity or stability of the dams as described in paragraph B.1., the Court of Appeals construed the two paragraphs as if they were two distinct, unrelated provisions. Moreover, the Court of Appeals omitted from its analysis pertinent language in paragraph B.2. The Court of Appeals stated:

> The Special Provisions of the contract limit the liability established by the Standard Provisions. These Special Provisions "apply to

the Safety Inspection Work Only." Professional Services Agreement, IV.B. Paragraph B.1. defines the scope of liabilities Beck agreed to undertake:

> The Client [Sitka] understands . . . that for the compensation herein provided, the Consulting Engineer [Beck] cannot expose itself to liabilities disproportionate to the nature and scope of [Beck's] services or the compensation payable to it hereunder. Therefore, . . . under no circumstances shall [Beck] be considered a guarantor of the safety, integrity or stability of the projects as to which said inspection, analysis and reports are made by [Beck].

Professional Services Agreement, IV.B.1.

The district court correctly concluded that this provision would limit Beck's liability in the event of a catastrophic event such as the collapse of the dam. But the second special indemnity limit does not apply solely to such a catastrophe:

> It is further agreed that although [Beck] . . . has the legal liability of an independent engineering consultant . . ., such liability for *all* damages or liabilities of *any* kind or nature . . . arising out of the projects of [sic] the entering into or performance of this Agreement, shall in no event exceed the aggregate of the compensation of [Beck], and [Sitka] shall and hereby does agree to indemnify, defend

> and hold harmless [Beck] . . . from all claims, liabilities, losses and expenses in excess of such compensation.

(App. C. at 14a-15a).

Although the Court of Appeals acknowledged that Alaska law requires contracts to be interpreted to give effect to the reasonable expectations of the parties, the court summarily concluded without undertaking the requisite analysis: "Nothing in this broadly worded provision suggests that its limitation applies only in the event of catastrophe." (App. C. at 14a). (emphasis added). Accordingly, the Court of Appeals held that the general provisions indemnity clause, in which Beck agreed to hold Sitka harmless, applied to claims arising from "remedial work" and the Special Provisions indemnity clause, in which Sitka agreed to hold Beck harmless, applied to *all* claims arising from "safety inspection work," whether arising out of Beck's ordinary negligence or errors and omissions in Beck's engineering work.

Remarkably, in order to reach its conclusion the Court of Appeals ignored, and actually omitted from its analysis, the very language in paragraph B.2. that the District Court held limited the scope of the Special Provisions indemnity clause. The italicized language from Paragraph B.2. was not considered by the Court of Appeals:

> *Indemnity* - It is further agreed that although the Consulting Engineer *in the rendition of its services pursuant to the provisions hereof* has the legal liability of an independent engineering consultant *to render said services in accordance with generally-accepted engi-*

> *neering practices*, such liability for all damages or liabilities of any kind or nature, including but not limited to damages to the property of the client or others and injury to or death of any persons, as a result of any act or omission of the Consulting Engineer. . . .

(App. E. at 40a).

However, this very language was cited by the District Court when it rejected Beck's argument that the Special Provisions applied to ordinary negligence in the performance of its safety inspection work because Beck's interpretation "renders meaningless important language contained in Paragraphs III.F and IV.B." (App. D. at 24a-25a). In the District Court's opinion, the liability addressed by the Special Provisions, and thus the liability for which Sitka agreed to indemnify Beck, was limited to liability arising out of Beck's failure to apply generally accepted engineering practices in analyzing or formulating opinions as to the integrity of the dam. (App. D. at 24a).

Even more surprising, after holding that the Special Provisions applied to *all* claims arising from safety inspection work, the Court of Appeals did not remand to the District Court with instruction to determine if an issue of fact remained with regard to whether Nicholas died while performing safety inspection work. Despite the fact that the District Court had expressly refrained from deciding the matter, the Court of Appeals concluded "as a matter of law" that Nicholas died "while performing 'safety inspection work', as that term is used in the contract." (App. C. at 15a). Consequently, the Court of Appeals held that no material issue of fact remained, and the Special Provi-

sions indemnity clause applied; therefore Beck's liability was limited to the amount of the contract, $28,000. In so holding, the Court of Appeals reversed the District Court and granted summary judgment for Beck.

On March 10, 1987, Sitka petitioned the Ninth Circuit Court of Appeals for rehearing with a suggestion of appropriateness of rehearing *en banc*. (App. B. at 2a). Sitka argued that the Court of Appeals had exceeded its appellate jurisdiction by deciding a dispositive issue of fact when the factual issue was not properly before it. Second, Sitka argued that the Ninth Circuit Court of Appeals erred in its application of Alaska law in construing the terms of the contract between Sitka and Beck. Third, Sitka urged the Ninth Circuit Court of Appeals to reconsider the propriety of its unique *de novo* standard of review of the District Court's interpretation and application of the law of the state in which it sits. On April 23, 1987, the Ninth Circuit Court of Appeals denied Sitka's petition. (App. A. at 1a).

Sitka now petitions the Supreme Court of the United States for a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals. The Court should grant this petition based on any one of Sitka's contentions in support thereof. The Court of Appeals exceeded its appellate jurisdiction by deciding an issue of fact not properly before it, rather than remanding the case to the District Court. Further, by summarily concluding that the "broadly worded" Special Provisions indemnity clause unambiguously revealed the expectations of the contracting parties, the Court of Appeals for the Ninth Circuit ruled consistent with Washington law, the state in which each

member of the reviewing panel resides, but contrary to controlling Alaska law. Finally, the Ninth Circuit Court of Appeals' *de novo* standard of review of a District Court's interpretation and application of the law of the state in which it sits unfairly deprives state litigants of the important benefit of trying issues of state law to a court which is familiar with the state's laws. For these reasons, the opinion of the Ninth Circuit Court of Appeals must be reversed, and the judgment of the District Court affirmed. In the alternative, the case should be remanded to the District Court with instruction to determine whether there is a material issue of fact requiring trial.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT COURT OF APPEALS EXCEEDED ITS APPELLATE JURISDICTION BY MAKING A FINDING OF FACT ON AN ISSUE LEFT UNDECIDED BY THE DISTRICT COURT, AND THEREFORE NOT PROPERLY BEFORE THE COURT OF APPEALS.

The holding of the Ninth Circuit Court of Appeals, that Beck's liability for general negligence in connection with Nicholas' death is limited by the Special Provisions indemnity clause, is based on its finding of law that the Special Provisions clause applies to *all* claims arising out of "safety inspection work" and its finding of fact that Nicholas was performing "safety inspection work" at the time of his death. In making a finding of fact, expressly left undecided by the District Court, the Ninth Circuit Court of Appeals exceeded its appellate jurisdiction and unfairly deprived Sitka of its right to a full hearing on a dispositive issue in the case.

Courts of Appeals' appellate jurisdiction is limited to that conferred by statute. *Russell v. Law Enforcement Assistance Administration*, 637 F.2d 1255, 1257 (9th Cir. 1980). Court of Appeals jurisdiction is conferred by 28 U.S.C. § 1291. Section 1291 provides in pertinent part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . ." In short, the Courts of Appeals have jurisdiction to review judgments of the District Courts. *See Yale v. National Indemnity Co.*, 602 F.2d 642, 645 (4th Cir. 1979). Appellate Courts have jurisdiction only to rule on issues which were ruled on by the District Court. *See International Medical Prosthetics Research Associates, Inc. v. Gore Enterprise Holdings, Inc.*, 787 F.2d 572, 573 n. 2 (Fed. Cir. 1986). Courts of Appeals "cannot and will not" engage in *de novo* fact finding necessary to support a judgment on other grounds "however clear those facts may appear and however clear those grounds may be." *Id.* at 577.

The Ninth Circuit Court of Appeals in the instant action had jurisdiction to review the District Court's interpretation of the Special Provisions indemnity clause. It had jurisdiction to conclude, as it did, that the District Court erred in its interpretation. However, it did not have jurisdiction to rule on the factual issue of whether Nicholas was performing "safety inspection work."

Having made its finding that the District Court erred in its interpretation of the disputed contract provisions, the proper course of action would have been for the Court of Appeals to remand with instruction to vacate the judgment and to determine whether a material issue of fact remained with regard

to whether Nicholas was performing safety inspection work. *See Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943) (Court of Appeals has no power to find the facts). If not, the District Court would rule on that issue as a matter of law. If so, a jury would decide the issue. In either case, Sitka would have an opportunity for a full hearing on this dispositive issue of fact.

The prejudice to Sitka could not be greater. Nicholas' work was preliminary to Beck's safety inspection of the dam. Nicholas' job was to put the dam into a condition where it could be inspected by Beck's engineers. The District Court explained in dicta: "Indeed, the work of the decedent was obviously preliminary to [Beck's safety inspection] analysis and opinion formation." (App. D. at 24a-25a). If the Court of Appeals had remanded the case to the District Court for determination of whether as a matter of law Nicholas was performing safety inspection work, it is possible the District Court would have concluded, after a full hearing, with oral testimony if necessary, that Nicholas was *not* performing safety inspection work. Much more likely, the District Court could have found that there remained a genuine issue of fact that had to be decided by a jury. Fed. R. Civ. P. 56.

If the District Court had found that Nicholas was not, as a matter of law, performing safety inspection work, and again granted summary judgment to Sitka, Beck could have appealed the decision to the Court of Appeals. The issue then would be properly before the Court of Appeals and both parties would have the opportunity to fully brief and argue the issue. As it was, Sitka had no notice that the issue would be decided by the Court of Appeals. By usurping the

original jurisdiction of the District Court and making a finding on an issue of fact expressly left undecided by the District Court, the Ninth Circuit Court of Appeals deprived Sitka of a full hearing on the issue, before a jury, before the District Court, and, if necessary, before an appellate court.

II. THE NINTH CIRCUIT COURT OF APPEALS ERRONEOUSLY INTERPRETED THE DISPUTED CONTRACT BECAUSE THE COURT FAILED TO ADHERE TO ALASKA LAW ON CONTRACT INTERPRETATION.

The District Court held that the indemnity provision of the Special Provisions, paragraph B.2., was intended to limit Beck's liability only for catastrophic losses arising from a breach of Beck's duty to inspect and determine the "safety, integrity or stability" of the Blue Lake dam according to "generally-accepted engineering practices." (App. D. at 24a). The Court of Appeals held that paragraph B.2. of the Special Provisions applies to *all* liability arising out of Beck's performance of "safety inspection work." (App. C. at 15a).

This case is in Federal Court by reason of diversity jurisdiction. The District Court and the Ninth Circuit Court of Appeals agreed that Alaska law controls. Under Alaska law when the contracting parties disagree about the provisions of a contract, it is the duty of the court to ascertain and give effect to the intentions of the parties at the time the contract was formed. *AMFAC Hotels & Resorts, Inc. v. State, Dept. of Transportation & Public Facilities*, 659 P.2d 1189, 1194 (Alaska 1983). To assure fairness in contract interpretation, the Alaska Supreme Court has established rules of analysis to be followed by the trial

courts. The difference between the analysis and the conclusions of the District Court and the Court of Appeals is directly attributable to the Court of Appeals' failure to follow the rules of analysis set forth by the Alaska Supreme Court.

In *Craig Taylor Equipment v. Pettibone Corp.*, 659 P.2d 594, 597 (Alaska 1983), the Alaska Supreme Court explained how Alaska contract disputes are to be resolved:

> In ascertaining the reasonable expectations of the parties, this court has looked in the past to the language of the provisions in controversy, to the language of the contract as a whole, to the objects sought to be accomplished by the contract, to the circumstances surrounding its adoption, and to the case law interpreting similar provisions. We will also keep in mind . . . that, as a rule, form contracts are to be construed against the furnishing party.

Following the guidance of the Alaska Supreme Court, the District Court concluded that pursuant to the Standard Provisions liability clause Beck agreed to hold Sitka harmless for liability arising out of its *ordinary negligence*, and pursuant to the Special Provisions indemnity clause Sitka agreed to hold Beck harmless for liability arising out of Beck's *engineering negligence* in forming an opinion about the safety of the Blue Lake dam. The District Court based its well reasoned conclusions on the following facts:

1. Pursuant to paragraph III.E. of the Standard Provisions, Beck was required to purchase $5 million

professional liability and comprehensive general liability insurance. (App. E. at 34a-35a).

2. The contract does not require Sitka to purchase any insurance.

3. Pursuant to paragraph III.F. of the Standard Provisions, Beck agreed to indemnify Sitka for all liability arising out of Beck's work up to the amount of Beck's insurance. For liability in excess of Beck's insurance, $5 million minimum, Sitka agreed to indemnify Beck. (App. E. at 35a).

4. The Special Provisions, Part IV, expressly modify the liability agreement in the Standard Provisions for "safety inspection work only." (App. E. at 39a).

5. Paragraph B.1. of the Special Provisions defines the scope of Beck's "safety inspection work" (to which the Special Provisions apply) as "inspection, analysis and preparation of reports" regarding the condition of the Blue Lake dam in accordance with "generally-accepted engineering practices." (App. E. at 39a-40a).

6. Paragraph B.1. of the Special Provisions further explains that the concern addressed by the Special Provisions is "liabilities disproportionate to the nature and scope" of Beck's "services or compensation." (App. E. at 39a-40a). In other words, Beck did not contract to build or maintain Blue Lake dam, and under no circumstances would Beck guarantee its safety.

7. Pursuant to paragraph B.2. of the Special Provisions, the parties agreed that Beck's liability arising out of "said services," *i.e.*, inspection, analysis and preparation of reports regarding the condition of Blue Lake dam, was limited to the amount of the contract,

$28,000, and Sitka agreed to indemnify Beck for "such liability" in excess of $28,000. (App. E. at 40a).

8. The entire Professional Services Agreement is on a form provided by Beck and in language drafted by Beck. (App. D. at 22a).

The Ninth Circuit Court of Appeals, on the other hand, looked no further than the "broadly worded" language of paragraph B.2. of the Special Provisions and concluded that by its plain language Sitka agreed to hold Beck harmless for *all* liability above $28,000 arising out of the "safety inspection work." (App. C. at 15a). By negative inference, the Court of Appeals concluded that the Standard Provisions applied to liability arising out of "remedial" work. Thus, the Court of Appeals saw no inconsistency in its interpretation of the contract. (App. C. at 15a).

The Court of Appeals did not address the insurance agreement that required only Beck to purchase $5 million insurance. Nor did the Court of Appeals explain why it was reasonable to interpret the second paragraph of the Special Provisions, paragraph B.2., as being much broader than the paragraph describing the "scope" of the Special Provisions, paragraph B.1. The Court of Appeals also failed to explain why it pointedly ignored the very language the District Court found especially significant. Finally, the Court of Appeals made no attempt to explain how its interpretation of the contract was commercially reasonable. In short, the Court of Appeals undertook no analysis whatsoever beyond reading the disputed indemnity provision.

Each member of the reviewing panel of the Ninth Circuit Court of Appeals in this case resides in Wash-

ington. Not surprisingly, the Court of Appeals' "plain language" analysis is consistent with Washington law. Under the Washington rule, if the language of a contract is unambiguous, the intent of the parties is determined from the language alone without resort to other rules of construction. *See Roberts v. Continental Ins. Co.*, 770 F.2d 853, 855 (9th Cir. 1985) (Wright, J.). However, this is not the rule in Alaska. Under Alaska law, in every case of a disputed contract all the relevant extrinsic evidence bearing on the intentions of the contracting parties must be analyzed to determine whether or not an ambiguity exists. *See National Bank of Alaska v. J.B.L.&K. of Alaska, Inc.*, 546 P.2d 579, 584 (Alaska 1976).

For the purpose of determining the intent of the parties to a contract, extrinsic evidence refers to evidence other than the language of the contract which bears on the parties' intentions. *Wright v. Vickaryous*, 598 P.2d 490, 497 (Alaska 1979). As explained in *Craig Taylor Equipment v. Pettibone Corp.*, 659 P.2d at 597, such other evidence includes the language of the contract as a whole and the objects sought to be accomplished by the contract. In other words, in every case of a dispute over contract provisions the court's interpretation must be commercially reasonable, regardless of how "plain" the language may appear to the court at first blush.

Here, the Court of Appeals concluded that the intent of the parties was to limit Beck's liability for ordinary negligence arising out of safety inspection work to $28,000. At the same time, the parties agreed that only Beck must insure against ordinary negligence in the amount of $5 million. Weighing the contract as a whole, and considering the totality of the

circumstances surrounding the contract, the Court of Appeals' interpretation is patently unreasonable.

Finally, even if the Court of Appeals' interpretation of the contract were reasonable, it was improper for the Court of Appeals to reverse the District Court and grant summary judgment to Beck because reasonable minds differed as to the intent of the parties to the contract. Under Alaska law, it is the reasonable expectations of the parties and not the plain language of the contract, which is controlling. In every case where the parties dispute the provisions of a contract, the court must consider extrinsic evidence to determine the reasonable expectations of the parties. *See National Bank of Alaska v. J.B.L.&K. of Alaska, Inc.*, 546 P.2d at 384-85. Extrinsic evidence refers to evidence other than the language of the contract which bears on the parties' intentions. *See Wright v. Vickaryous*, 598 P.2d at 497. Generally, where interpretation of a written instrument turns on the acceptance of extrinsic evidence, the process of weighing such evidence is for the trier of fact. *See Hausam v. Wodrich*, 574 P.2d 805, 809 (Alaska 1978). Where reasonable minds could not differ, of course, the matter may be decided by the court.

In this case, the District Court, after thoroughly exploring the reasonable expectations of the parties, concluded that the parties intended that the general provisions indemnity clause to apply under the circumstances of McKinley's death. If, after following the rules of analysis as set forth by the Alaska Supreme Court in *Craig Taylor Equipment*, 659 P.2d at 597, the Court of Appeals comes to the opposite conclusion, the disagreement of the courts is conclusive evidence that reasonable minds could differ. Con-

sequently, the case must be remanded to the District Court for a determination by a jury of the reasonable expectations of the parties.

III. DUE PROCESS REQUIRES THAT THE NINTH CIRCUIT COURT OF APPEALS RETURN TO A "DEFERENCE" STANDARD IN REVIEWING A DISTRICT COURT'S INTERPRETATION AND APPLICATION OF THE LAW OF ITS HOME STATE.

Due process requires that every litigant be afforded a full, fair and impartial hearing. The only purpose of appellate review is to further the goal of due process.

In applying state law in a diversity case, federal courts are bound by state court precedent. *Erie RR.Co. v. Tompkins*, 304 U.S. 64 (1938). When parties are litigating unresolved issues of state law in federal court, the federal court's function

> is not to choose the rule that it would adopt for itself, if free to do so, but to choose the rule that it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt.

C. Wright, *Handbook of the Law of Federal Courts* § 58 at 375 (4th ed. 1983).

Federal District Courts have jurisdiction to decide issues of federal law, state law, and issues of fact. To further the goal of due process, parties to a civil action may appeal "as a matter of right" from the final judgment of a District Court to the Circuit Court of Appeals, except where direct review may be had

in the Supreme Court. Circuit Courts of Appeals have jurisdiction to review the decisions of the District Courts.

There is no rule prescribing the standard of appellate review on issues of state law. Until 1984 there was no need for a rule, for every Circuit followed the well-reasoned rule of "deference." In 1984, however, the Ninth Circuit Court of Appeals in *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc), in a 6-5 decision, adopted a *de novo* standard of review on issues of state law. Contrary to the opinions of every sister Circuit, *see generally*, *Id.* at 1403-12 (Schroeder, J., dissenting), and its own prior reasoning, the Ninth Circuit Court of Appeals concluded that there is no sound reason for according greater weight to district judges' determination and application of state law than to district judges' determination and application of federal law. *Id.* at 1400.

A *de novo* standard of review on issues of state law is unsound and contrary to the goal of due process. As Judge Schroeder wrote in her compelling dissent in *In re McLinn*:

> [D]ifferences exist between the appellate and the district courts in their respective relationships to the law of a particular state. As a practical matter district judges hear a great number of cases involving the law of their home states. This court's appellate jurisdiction, on the other hand, encompasses nine states, and questions of state law arise from all of them. Moreover, district judges generally have practiced within a state for some years while appellate court judges, more often

> than not, have no similar relationship to the law of the state in question.

Id. at 1405 (Schroeder, J., dissenting).

This case illustrates the perils of a *de novo* review of a District Court's interpretation and application of state law. In interpreting the disputed contract provisions, the reviewing panel of the Ninth Circuit Court of Appeals, all residents of Washington, employed rules of contract interpretation consistent with Washington law. Not surprisingly, they reached a conclusion opposite to the conclusion of the District Court for the District of Alaska, which followed rules of analysis required by Alaska law. In short, the Court of Appeals committed "cross-over" error.

A critical element of good jurisprudence is continuity. Two hundred years after the formation of this nation, the only justification for diversity jurisdiction is to avoid even the allegation of inequitable treatment of foreign citizens in state courts -- in other words, discontinuity in the application of state law to favor citizens of the state. Inherent in the right of a foreign citizen to seek diversity jurisdiction in federal court is the belief that the federal District Court will interpret and apply state law as a state court would in a case between state citizens. Otherwise, diversity jurisdiction would be unfairly prejudicial to state citizens.

In this case, Beck brought its action in federal court in Anchorage, which forced Sitka to defend itself over 2000 miles from the state court in Sitka. Nevertheless, bringing the action in federal court did not substantively prejudice Sitka. The Honorable Judge Holland, the presiding judge, became a member of

the Alaska Bar in February, 1963. He was appointed Federal District Judge for the District of Alaska in July of 1984. Judge Holland clearly has the expertise, of which Judge Schroeder spoke, to interpret and apply Alaska law as would an Alaska state court.

However, upon appeal to the Ninth Circuit Court of Appeals, the situation changed. Not only was Sitka required to defend its position in Seattle, Washington, but because of the *de novo* standard of review, Sitka's rights were determined by a panel that not only had no expertise in Alaska law, but in fact routinely applied law inimical to Alaska law.

Until 1984, the Courts of Appeals of every circuit acknowledged that continuity in the interpretation and application of state law, as state law would be interpreted and applied in state court, could best be accomplished in federal court by adopting a standard of review that incorporated some degree of deference to the District Courts. This reasoning is sound. The Ninth Circuit Court of Appeals' recent departure from a "deference" standard of review unnecessarily increases the risk of cross-over error and misinterpretation and misapplication of state law, all to the detriment of citizens of the state.

Additionally, as illustrated by this case, where there is *de novo* review, a Circuit Court may overlook its responsibility to adequately respond to a thorough and conscientious opinion from the District Court. As Judge Schroeder wrote:

> The most regrettable aspect of today's decision is the message it sends to the district courts and the litigants. It suggests to the district courts that time spent thoroughly ex-

> plaining a state law question is time wasted; we therefore will be deprived of their expertise. At the same time, the majority signals to litigants that reversals will be easier to obtain, thus encouraging more appeals. The inevitable result is that we will be faced with more state law issues, but provided with less guidance. The majority offers this result without any attempt to demonstrate that the standard it now decries has led to unfairness or incorrect results.

In Re McLinn, 739 F.2d at 1406 (Schroeder, J., dissenting).

No material benefit is gained by a *de novo* review. Accordingly, in the interests of fairness to the litigants, good jurisprudence, and uniformity throughout the circuits, the Ninth Circuit Court of Appeals must be compelled to give at least some weight to the District Court's interpretation and application of state law of the states in which it sits. Had it done so in the case at bar, this litigation might have been properly concluded. Moreover, such deference will prevent similar errors and appeals in the future.

CONCLUSION

For the foregoing reasons, this Court should grant Sitka's Petition for Writ of Certiorari.

Respectfully submitted.

Frederick H. Boness
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Attorneys for Petitioner
City and Borough of Sitka

July, 1987

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R.W. BECK & ASSOCIATES, PAUL T. CARSON, DPIC COMPANIES, AND AMERICAN MOTORISTS INSURANCE COMPANY (KEMPER GROUP)
Plaintiff-Appellant,

v.

CITY AND BOROUGH OF SITKA,
Defendant-Appellee.

CA No. 86-3856

DC No. A-83-513-CV
(Alaska)

ORDER

FILED
APR 23 1987
Before: WRIGHT, FARRIS, and BEEZER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Farris and Beezer have voted to reject the suggestion for a rehearing en banc and Judge Wright recommends rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Ninth Circuit

Appeals Docket No. 86-3856
D.C. No. A-83-513-CV

R. W. BECK & ASSOCIATES, PAUL W. CARSON, DPIC COMPANIES and AMERICAN MOTORISTS INSURANCE COMPANY (KEMPER GROUP),
Plaintiffs-Appellants,

vs.

CITY AND BOROUGH OF SITKA
Defendant-Appellee and Petitioner.

Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The City and Borough of Sitka, defendant-appellee above named and petitioner herein, presents this, its suggestion of appropriateness of rehearing *en banc* and its petition for a rehearing.

I. PRELIMINARY STATEMENT

Petitioner, City and Borough of Sitka, suggests that a rehearing *en banc* is appropriate pursuant to Fed. R. App. P. 35. The bases for this petition for rehearing involve questions of exceptional importance: (1) Whether the Court of Appeals exceeded its appellate jurisdiction by making a finding on an issue of fact especially where such factual issue was not properly before it; (2) Whether the Court

of Appeals erred in its application of the law of the State of Alaska; and (3) Whether the Ninth Circuit Court of Appeals should reconsider its *de novo* standard of review of a district court's interpretation of the law of the state in which it sits.

II. STATEMENT OF FACTS

In January of 1983, the City and Borough of Sitka (hereinafter Sitka), pursuant to a Professional Services Agreement, contracted with R.W. Beck & Associates (hereinafter Beck), a consulting engineer firm, to perform remedial work and a Federal Energy Regulatory Committee (FERC) safety inspections on the Blue Lake Hydroelectric Dam near Sitka, Alaska. Exhibit A. By the terms of the contract, Sitka was to provide certain services. Pursuant to that agreement, Sitka contracted with Alaska Aquatic Dive Center, Inc. to perform underwater inspections. McKinley Nicholas, President and Chief Executive Officer of Alaska Aquatic, made the inspections.

On April 20, 1983, in accordance with that contract, Nicholas, under Beck's supervision, was making a survey of the extent of debris around the intake gate at Blue Lake Dam. He also was looking behind the trash rack in order to discover leakage. Unfortunately, the intake gate was open and Nicholas was sucked into the penstock and died. Nicholas' estate and his widow sued Sitka, Beck and Paul W. Carson, the Beck engineer who supervised Nicholas' dive.

The contract between Beck and Sitka contains two hold harmless provisions. The standard provisions indemnity clause provides that Beck will hold Sitka harmless. Part III, III.F., Exhibit A at 2. The special provisions indemnity clause provides that as to the performance of "Safety Inspections Work Only," under certain circumstances, Sitka will hold Beck harmless. Part IV, B., Exhibit A at 4. After the widow of McKinley Nicholas brought action against

Beck and Sitka in state court, each tendered defense to the other pursuant to the hold harmless clause most favorable to its position. When Sitka refused Beck's tender, Beck brought this declaratory action in federal court.

The state action was tried during September, 1984. On September 26, 1984 the jury found for the plaintiffs. Liability was apportioned as follows: Nicholas - 10%, Sitka - 50%, Beck and Carson - 40%. The original award of $3,375,000 was reduced by remitter to the principle amount of $2,835,500.

Beck and Sitka then filed cross motions for summary judgment in this federal declaratory action, each seeking indemnity for claims and losses arising from the death of McKinley Nicholas. The district court ruled on the cross motions on April 7, 1986. Exhibit B.

III. DECISION APPEALED FROM

The District Court for the District of Alaska interpreted both indemnity provisions of the Professional Services Agreement. It held that the standard provisions indemnity clause, requiring Beck to indemnify Sitka, is applicable under the circumstances presented by Nicholas' demise. It held, further, that the special provisions indemnity clause is applicable only when Beck was performing "Safety Inspection Work." The court held that it need not decide whether McKinley Nicholas died during the course of safety inspection work because the "death of McKinley Nicholas is simply not the kind of claim to which the terms of the special provisions, taken as a whole, were intended to have application." Exhibit B at 10.

The court based this conclusion on two preliminary conclusions, each alone sufficient to support its holding. It found first that the special provisions indemnity clause is only applicable to liabilities which arise out of a Beck's breach of its duty to analyze and make opinions according to generally accepted engineering practices. Exhibit B at

10. It is indisputed that McKinley Nicholas' death was not the result of such breach. Exhibit B at 10. It found further, that the special provisions indemnity clause is applicable only to catastrophic loss. Exhibit B at 9. Again, McKinley Nicholas' death was not associated with a catastrophic loss.

The district court, consequently, denied Beck's motion for summary judgment and granted Sitka's, concluding that Sitka was entitled to indemnification from Beck. Beck then appealed this judgment to the Ninth Circuit Court of Appeals.

IV. COURT OF APPEALS' REVERSAL

In a memorandum, Exhibit C, the Court of Appeals reversed the district court, holding: (a) that the "record establishes, as a matter of law, that the insured[1] (sic) died while performing 'safety inspection work' as that term is used in the contract;" (b) that, consequently, the special provisions indemnity clause of the contract is applicable; (c) that the special provisions indemnity clause applies to *all* damages and liabilities of any kind and not just to catastrophes, as held by the district court; and finally (d) that because the subject claim is of the sort covered by the special provisions indemnity clause that Sitka is required to indemnify Beck for all claims in excess of Beck's compensation. The Court of Appeals did not address the second basis for the district court's holding, i.e., that the liability referenced in the special provisions indemnity clause was liability which arises out of Beck's breach of its duty to analyze and make opinions according to generally accepted engineering practices.

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[1]This is undoubtedly a typographical error. The Court no doubt intended to name McKinley Nicholas.

V. BASES FOR REHEARING

A. The Court Of Appeals Overstepped Its Appellate Jurisdiction.

The Court of Appeals grounds its reversal on its finding of fact that McKinley Nicholas died while performing "Safety Inspection Work." Not only is the Court of Appeals without authority to make findings with regard to issues of fact, that particular issue of fact was not properly before the Court of Appeals. The district court had deliberately made no finding with regard to the status of McKinley Nicholas' work. Exhibit B at 9.

Courts of Appeals' appellate jurisdiction is limited to that conferred by statute. *Russell v. Law Enforcement Assistance Administration,* 637 F.2d 1255, 1257 (9th Cir. 1980). Court of Appeals jurisdiction is conferred by 28 U.S.C. § 1291. Section 1291 provides in pertinent part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . ." In short, the Courts of Appeals have jurisdiction to review judgments of the district court. *See Yale v. National Indemnity Co.,* 602 F.2d 642, 645 (4th Cir. 1979). Appellate Courts have jurisdiction only to rule on issues which were ruled on by the district court. *See International Medical Prosthetics Research Associates, Inc. v. Gore Enterprise Holdings, Inc.,* 787 F.2d 572, 573 n. 2 (Fed. Cir. 1986).

The Court of Appeals in the instant action had jurisdiction to review the district court's interpretation of the special provisions indemnity clause. It had jurisdiction to conclude, as it did, that the district court erred in its interpretation. However, it did not have jurisdiction to rule on the factual issue of whether McKinley Nicholas was performing "Safety Inspection Work."

This court should be guided by the analysis in *International Medical Prosthetic Research Associates,* 787 F.2d

572. In that case the district court had dismissed the action based upon its conclusion that it lacked subject matter jurisdiction. The Court of Appeals concluded that the district court had erred because it did, in fact, have the requisite jurisdiction. The parties argued that the dismissal was proper because of venue, service, and indispensability assertions. The Court of Appeals, nonetheless, stated, "Because the district court did not rule on Gore's asserted alternative bases for dismissal of the complaint, we cannot and will not engage in the fact-finding necessary to rule on them." *Id.* at 573 n. 2. *See, also, Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943) (Court of Appeals has no power to find the facts).

The court stated further, "On the record before us, the erroneous basis must stand alone, for it is not open to us to find *de novo* the facts necessary to support the judgment on other grounds, however clear those facts may appear and however attractive those grounds may be." *Id.* at 577. The court, therefore, remanded the case with instruction to vacate the judgment appealed from and for such further proceedings not inconsistent with the opinion. *Id.*

Having made its finding that the district court erred in its interpretation of Part IV, B.2., the proper course of action would have been for the Court of Appeals to remand with instruction to vacate the judgment and to determine whether there is a material issue of fact remaining with regard to whether McKinley Nicholas was performing "Safety Inspection Work." If not, the district court could rule on that issue as a matter of law. If so, a jury would decide the issue.

B. The Court of Appeals Erred In Its Application Of Alaska State Law.

A close reading of the memorandum decision of the Court of Appeals reveals that this honorable court did not apply Alaska rules of contract interpretation. It looked "first" to the plain language of Part IV, B.2. Finding no

ambiguity, it pronounced its interpretation as the paragraph's plain meaning. *Cf. Roberts v. Continental Ins. Co.*, 770 F.2d 853, 855 (9th Cir. 1985) (Wright, J.) (Under Washington rules of contract construction, if the language is unambiguous, the intent of the parties is determined from the language alone, without resort to other rules of construction.). Although the plain meaning of the language is considered in contract interpretation under Alaska law, it is but one of many factors which must be *simultaneously* considered.

According to Alaska law, the language of the provision in controversy must be construed: (1) in the context of the language of the contract as a whole; (2) with reference to the object sought to be accomplished by the contract; *and* (3) with reference to the circumstances surrounding the contract's adoption. *Craig Taylor Equipment Co. v. Pettibone Corp.*, 659 P.2d 594, 597 (Alaska 1983). Alaska law also requires that the court interpret contracts to give effect to all contract terms if possible. *Mitford v. de Lasala*, 666 P.2d 1000, 1005 (Alaska 1983). Finally, form contracts are to be construed against the furnishing party. *Craig Taylor Equipment Co.*, 659 P.2d at 597.

The Court of Appeals did not, as required by Alaska law, interpret Part IV, B.2. as it relates to the language of the contract as a whole. Nor did it interpret this paragraph in light of the object sought to be accomplished by the contract. Also, it did not analyze the impact which its interpretation would have on other contract provisions. Finally, the Court of Appeals did not construe Part IV, B.2. against Beck, the furnishing party.

In contrast, the District Court for the District of Alaska carefully applied the mandate of the law of the State of Alaska in its interpretation of the indemnity provisions of the Professional Services Agreement. The district court rejected Beck's argument, and the Court of Appeals' holding, that Sitka was obligated to defend, indemnify, and

hold Beck harmless from *all* claims arising out of safety inspection work to the extent that the same might exceeds Beck's compensation under the contract. The district court rejected this argument because this interpretation "renders meaningless important language contained in paragraphs III.F and IV.B." Exhibit B at 9. Some of the language which Beck's interpretation would render meaningless in paragraph IV.B., is the very language which the Court of Appeals did not consider in its interpretation of that paragraph.

In reaching its conclusion that paragraph B.2. applies to *all* liabilities whatsoever, the Court of Appeals omitted from its consideration essential contract language. Doing so is of course, contrary to Alaska law. The underlined language was not considered by the Court of Appeals:

> Indenmity - It is further agreed that although the consulting Engineer in the rendition of its services pursuant to the provisions hereof has the legal liability of an independent engineering consultant to render said services in accordance with generally - accepted engineering practices, such liability for all damages or liabilities of any kind or nature . . . .

Exhibit A at 4. In the quote made by the Court of Appeals, this language is replaced by ellipses. Exhibit C at 2.

The district court held that this omitted language defines "such liabilities." It therefore concluded that the liabilities referenced in the special provisions indemnity clause were those liabilities which relate to a breach of Beck's duty to render analysis and opinions in accordance with generally accepted engineering practices. Exhibit B at 10.

The Court of Appeals read the provisions of Part III, B.1. as being separate and distinct from the provisions of Part III, B.2. The district court read the two paragraphs

in the context of each other as required by Alaska law. Exhibit A at 4.

The district court noted that Part IV, B.1. defines the scope of the special provisions indemnity clause. *See* Exhibit A at 4. The district court determined that the scope described in Paragraph B.1. sets forth the context of the liability described in paragraph B.2. Exhibit B at 9. The district court therefore concluded that the indemnity provision of paragraph B.2. only applies to catastrophic loss as described in B.1.

The Court of Appeals held that the "intent of the parties was to limit Beck's liability for the safety work it was to do for Sitka." Exhibit C at 3. This conclusion, in conjunction with the Court of Appeals' other holdings, conflicts with well established Alaska law because they render ineffectual several provisions of the Professional Services Agreement. These include: (1) The contract provision which required Beck to acquire liability insurance with coverage of not less than $5,000,000. Part III, III.E. Exhibit A at 2. If the intent of the parties was to generally limit Beck's liability, it is only reasonable that the contract would require that Sitka purchase insurance. There is, however, no such requirement in the contract; and (2) The standard liability provision which indicates that it is Beck which will defend and indemnify and hold Sitka harmless. Part III, III.F. Exhibit a at 2.

Further, if the work being performed by McKinley Nicholas was, in fact, safety inspection work, as held by the Court of Appeals, then the contract was exclusively a safety inspection work contract. *See, generally,* Exhibit A. This renders the Scope of Services provision, Exhibit A at 5, as well as the project description, Exhibit A at 1, which indicate that Beck would perform *both* remedial and FERC safety inspections, meaningless. Further, if the entire contract is but a safety inspection contract, then the

standard provisions indemnity clause, Part III, III.F., likewise would be rendered meaningless. Exhibit A at 2.

C. This Circuit Should Reconsider Its Standard Of Review.

The Ninth Circuit should reconsider the standard of review which it applies to a district court's interpretation of the law of the state in which it sits. At present, the Ninth Circuit reviews such determinations *de novo*. This case is indicative of the perils of such standard of review. A more appropriate standard of review would be that prescribed by Judge Schroeder in her dissent in *In re McLinn*, 739 F.2d 1395, 1403 (9th Cir. 1984) (Schroeder, J., dissenting). In that dissent, Judge Schroeder urged the Circuit Court to give "substantial deference" to the decision of a district court ruling on the state law of its home jurisdiction. *Id.* at 1404. As pointed out by Judge Schroeder, this Circuit's standard of *de novo* review is contrary to all reported decisions of the other Circuits as well as of views of scholarly authorities on the question. *Id.* at 1403.

Judge Schroeder concluded her dissent with a prediction as to the inevitable result of the court's ruling. She stated:

> The most regrettable aspect of today's decision is the message it sends to the district courts and the litigants. It suggests to the district courts that time spent thoroughly explaining a state law question is time wasted; we, therefore, will be deprived of their expertise. At the same time, the majority signals to litigants that reversal will be easier to obtain, thus encouraging more appeals. The inevitable result is that we will be faced with more state law issues, but provided with less guidance.

Id. at 1406.

Even if this court does not find it proper to give "substantial deference" to a district court's decision on a state

law question, this petitioner respectfully submits that it is appropriate for "some" consideration to be given to the district court's analysis. As a consequence of the Court of Appeal's lack of familiarity with Alaska rules of contract interpretation, it, as discussed above, misapplied the law of the State of Alaska. The district court's well reasoned order was apparently ignored by the Court of Appeals. As foreshadowed by Judge Schroeder, the district court's "time spent thoroughly explaining a state law question [was] time wasted."

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition and suggestion for rehearing *en banc* be granted and that the judgment of the District Court for the District of Alaska be, upon further consideration, affirmed, or in the alternative, remanded with instruction to vacate the judgment as it relates to the district court's interpretation of Part IV, B.2. and for further proceedings with regard to whether McKinley Nicholas was performing "Safety Inspection work" at the time of his death.

CAMAROT, SANDBERG & SMITH
Attorneys for Defendant-
Appellee and Petitioner

/s/Henry J. Camarot
Henry J. Camarot/Mark A. Sandberg

CERTIFICATE OF COUNSEL

I, Henry J. Camarot, attorney for the City and Borough of Sitka, petitioner herein do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for purpose of delay.

Dated this 10th day of March, 1987.

/s/Henry J. Camarot

Henry J. Camarot, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA No. 86-3856
DC No. A-83-513-CV

MEMORANDUM

R.W. BECK & ASSOCIATES, PAUL T. CARSON, DPIC COMPANIES, AND AMERICAN MOTORISTS INSURANCE COMPANY (KEMPER GROUP),
Plaintiff-Appellant,

v.

CITY AND BOROUGH OF SITKA,
Defendant-Appellee.

FILED
FEB 26 1977

Appeal from the United States District Court
for the District of Alaska
Honorable H. Russel Holland, District Judge, Presiding
Argued and Submitted January 6, 1987
Seattle, Washington

Before: WRIGHT, FARRIS and BEEZER, Circuit Judges.

This dispute arises from the indemnification provisions of a contract between Beck and Sitka. The district court granted Sitka summary judgment, construing the contract as requiring Beck to indemnify Sitka. We review a grant of summary judgment *de novo* to determine whether any

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

genuine issue of material fact remains and whether substantive law was correctly applied. *Gonzales v. Secretary of Health and Human Services*, 784 F.2d 1417, 1419 (9th Cir. 1986).

Construing the contract as a whole, we hold that the contract's "Special Provisions" limit Beck's liability in this case to the extent of its compensation by Sitka. The district court held that this limit on liability applied only in the event of a catastrophic loss such as the collapse of the dam. We reverse.

The Special Provisions of the contract limit the liability established by the Standard Provisions. These Special Provisions "apply to the Safety Inspection Work Only." Professional Services Agreement, IV.B. Paragraph B.1. defines the scope of liabilities Beck agreed to undertake:

> The client [Sitka] understands . . . that for the compensation herein provided, the Consulting Engineer [Beck] cannot expose itself to liabilities disproportionate to the nature and scope of [Beck's] services or the compensation payable to it hereunder. Therefore, . . . under no circumstances shall [Beck] be considered a guarantor of the safety, integrity or stability of the projects as to which said inspection, analysis and reports are made by [Beck].

Professional Services Agreement, IV.B.1.

The district court correctly concluded that this provision would limit Beck's liability in the event of a catastrophic event such as the collapse of the dam. But the second special indemnity limit does not apply solely to such a catastrophe:

> It is further agreed that although [Beck] . . . has the legal liability of an independent engineering consultant . . ., such liability for *all* damages or liabilities of *any* kind or nature . . . arising out

> of the projects of [sic] the entering into or performance of this Agreement, shall in no event exceed the aggregate of the compensation of [Beck], and [Sitka] shall and hereby does agree to indemnify, defend and hold harmless [Beck] . . . from all claims, liabilities, losses and expenses in excess of such compensation.

Professional Services Agreement, IV.B.2. (emphasis added).

Alaska law requires that contracts be interpreted to give effect to the reasonable expectations of the parties. *See Mitford v. de Lasala,* 666 P.2d 1000, 1005 (Alaska 1983). The first place courts look to determine the "reasonable expectations" of the parties is to the plain language of the disputed contract provisions. *See Craig Taylor Equipment Co. v. Pettibone Corp.,* 659 P.2d 594, 597 (Alaska 1983). The plain language of Paragraph IV.B.2 limits Beck's obligation to the $28,000 compensation it received from Sitka. Nothing in this broadly worded provision suggests that its limitation applies only in the event of catastrophe. This construction of the provision is consistent with Paragraph IV.B.1.

Alaska law also requires that courts interpret contracts to give effect to all contract terms where possible. *See Mitford v. de Lasala,* 666 P.2d at 1005. The intent of the parties was to limit Beck's liability for the safety work it was to do for Sitka. The record establishes as a matter of law that the insured died while performing "safety inspection work" as that term is used in the contract. The Special Provisions for indemnification apply. The Standard Provisions for indemnification would apply to any remedial work that Beck was to do for Sitka. Thus, contrary to Sitka's argument, the "exception" created by the Special Provisions does not swallow the "rule" created by the Standard Provisions.

The plain meaning of the contract limits Beck's liability in this case to the amount of its compensation by sitka.

REVERSED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A83-513 Civil
(Consolidated)

R. W. BECK & ASSOCIATES, PAUL T. CARSON, DPIC COMPANIES, and AMERICAN MOTORISTS INSURANCE COMPANY (KEMPER GROUP),

Plaintiffs,

vs.

CITY AND BOROUGH OF SITKA,

Defendant.

ADMIRAL INSURANCE COMPANY and JERSEY INTERNATIONAL GROUP, INC.,

Plaintiffs,

vs.

ESTATE OF McKINLEY NICHOLAS, et al.,

Defendants.

ORDER

(Ruling on Beck and
Sitka Motions
for Summary Judgment)

Plaintiff R.W. Beck & Associates (hereinafter "Beck") has moved for summary judgment on the theory that Defendant City and Borough of Sitka (hereinafter "Sitka") owes it indemnity for claims and losses arising from the death of McKinley Nicholas. This motion is opposed by Sitka (as well as Western World Insurance Company, one of the defendants in the above-captioned consolidated cases) on various legal but no factual issues.

Sitka has itself filed two motions for summary judgment. In its first motion for summary judgment, Sitka contends that the Court should as a matter of law reject Beck's claims for indemnity against Sitka. In the second motion for summary judgment, Sitka seeks a determination that Beck must indemnify Sitka from any and all liability arising from the death of McKinley Nicholas. Beck opposes these motions, both as to their legal aspects and by means of a contention that there are genuine issues of material fact to be litigated.

Factual Background

On January 26, 1983, Beck and Sitka entered into a "Professional Services Agreement"[1] relative to the Blue Lake Dam Project, and more particularly with regard to some remedial and Federal Energy Regulatory Commission safety inspection work on that project. Beck agreed to provide engineering services for Sitka as detailed in this contract. In connection therewith, Sitka engaged the services of Alaska Aquatic Dive Center, Inc., as an independent contractor to perform certain related work which had to be done underwater. Pursuant to the "work plan" which was a part of the professional services agreement (paragraph 2.a(2)(d)), Beck provided "on-site . . . technical guidance to [Sitka's] Diving Inspector contractor." Two days after the signing of the last-mentioned contract, McKinley Nicholas, president of Alaska Aquatic Dive Center, Inc., died while performing underwater work in furtherance of Beck's professional services agreement with Sitka.

The estate of McKinley Nicholas sued both Beck and Sitka. The trial of the estate's claim resulted in a jury verdict of over $3 million. In response to interrogatories,

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[1]References herein to "Paragraph III.F", for example, should be understood to mean paragraph III.F of the professional services agreement.

the jury found that Sitka was 50% negligent for the death of McKinley Nicholas, that Beck was 40% negligent for the death, and that McKinley Nicholas was comparatively negligent to the extent of 10% in connection with his death. After proceedings not here pertinent, an amended judgment was entered against Beck and Sitka, jointly and severally, in the amount of $3,657,467.09. Beck and Sitka appealed this judgment. During the appeal, which has not yet been ruled upon, Beck settled with the estate of McKinley Nicholas, agreeing to pay $1.5 million.

By these proceedings, Beck seeks to recoup its settlement and Sitka seeks to require that Beck indemnify it for the balance of the judgment.

A decision on all of the motions for summary judgment turns upon the interpretation of the "standard provisions" and the "special provisions" of the professional services contract between Sitka and Beck. In its simplest form the controversy between Sitka and Beck as regards their agreement poses the question: "Are the standard provisions of the agreement applicable to the Nicholas claim, or are the special provisions applicable to the Nicholas claim?"

Paragraphs II.E, III.F, and III.H of the standard provisions are involved in the dispute. Paragraph B of the special provisions is involved in the dispute.

Paragraph III.E deals with insurance. By the terms of this paragraph, Beck was required to and in fact did take out liability insurance at its expense protecting against the risk of claims such as that brought by the estate of McKinley Nicholas "in a maximum amount not less than $5 million. . . ."

Paragraph III.F was entitled "Liability" and embodies a detailed cross-indemnity agreement between Beck and Sitka. The risk of loss is divided between the parties by reference to the amount of the loss, the cross-over point

as to who must indemnify whom being, as a practical matter, the amount of the above-referenced insurance requirement. Subparagraph 1 provides in pertinent part:

> [Beck] shall defend, indemnify and hold harmless [Sitka] . . . from all sums for which it is finally determined that [Beck] has legal liability to other than [Sitka] arising out of any acts, errors, or omissions of [Beck] in furnishing services pursuant to this Agreement; provided, however, such defense, indemnification, and hold harmless shall not exceed the sum of the amounts paid to or on behalf of [Beck] as the proceeds of any applicable insurance plus the deductible amount of such insurance.

Subparagraph 2 of Paragraph III.F is essentially a recapitulation of Subparagraph 1, providing in substance that Sitka will limit any claims against Beck to the agreed upon amounts.

Subparagraph 3 of Paragraph III.F provides impertinent part:

> [F]or amounts not reimbursed by nor within the deductible amount of the insurance maintained by [Beck], [Sitka] shall indemnify [Beck] . . . against all expense or liability of any kind arising out of any claim for loss of life, bodily or personal injury . . . from any cause related to the furnishing of the services covered by this Agreement, except the sole negligence of [Beck].

Paragraph III.H, entitled "Contractor's Performance and Safety", provides in pertinent part:

> [Beck] shall not be responsible: for safety on [Sitka's] premises or project site, except for the safety of personnel of [Beck], its Special Consultants and Subcontractors; for providing or as-

suring a safe place for the performance of the Contractor's work; for safety precautions, programs or equipment; [etc.]

The special provisions of the professional services agreement expressly modify the above "liability" agreement contained in the standard provisions, Part III.F. Paragraph B of the special provisions provides in pertinent part:

The following SPECIAL PROVISIONS shall apply to the Safety Inspection work Only:

1. *Scope*—In performing the safety inspection [Beck] will base its analysis and opinions on generally-accepted engineering practices. [Sitka] understands, however, that for the compensation herein provided, [Beck] cannot expose itself to liabilities disproportionate to the nature and scope of [Beck's] services or the compensation payable to it hereunder. Therefore, it is understood and agreed [Beck's] services are limited to the inspection, analysis, and preparation of reports required by [Sitka] and that under no circumstances shall [Beck] be considered a guarantor of the safety, integrity or stability of the projects as to which said inspection, analysis and reports are made by [Beck].

2. *Indemnity*—It is further agreed that although [Beck] in the rendition of its services pursuant to the provisions hereof has the legal liability of an independent engineering consultant to render such services in accordance with generally-accepted engineering practices, such liability for all damages or liabilities of any kind or nature, including but not limited to damages to the property of [Sitka] or others and injury to or death of any persons, as a result of any act or omission of [Beck], whether or not due to [Beck's] fault or negligence or breach of this

> Agreement, arising out of the projects of [sic] the entering into or performance of this Agreement shall in no event exceed the aggregate of the compensation of [Beck] and [Sitka] shall and hereby does agree to indemnify, defend and hold harmless [Beck] . . . from any claims, liabilities, losses and expenses in excess of such compensation.

The entirety of the professional services agreement is on a form provided by Beck and in language drafted by Beck. There is no contention by either Sitka or Beck that the agreement failed to embody terms which they had intended, nor is there any contention that the terms as quoted above inaccurately express the intentions of the parties. We do have a disagreement between the parties as to how the above language should be construed and applied as regards the claim of the estate of McKinley Nicholas arising from his death while performing work on the project in question under contract to Sitka.

Beck Motion for Summary Judgment

In support of its motion for summary judgment, Beck argues that there are no conflicting clauses or ambiguities within the professional services agreement. As Beck argues, mere disagreement between the parties over the application of their contract terms does not necessarily create an ambiguity. Rather, ambiguity exists when the contract, taken as a whole, is reasonably subject to different interpretations. *O'Neill Investigations v. Illinois Emp. Ins. of Wausau,* 636 P.2d 1170, 1174 (Alaska 1981). It is not the function of the Court to create conflict; rather, the contracts are to be construed and applied wherever possible so as to harmonize various provisions and thereby avoid conflicts. *Earthmovers of Fairbanks, Inc. v. State,* 644 P.2d 238, 240 (Alaska 1982); *McBain v. Pratt,* 514 P.2d 823, 828 (Alaska 1973). As the Alaska Supreme Court states

this proposition in *Craig Taylor Equipment v. Pettibone Corp.*, 659 P.2d 594, 597 (Alaska 1983):

> Contracts are to be interpreted so as to give effect to the reasonable expectations of the parties, that is, to give effect to the meaning of the words which the party using them should reasonably have apprehended that they would be understood by the other party. In ascertaining the reasonable expectations of the parties, this court has looked in the past to the language of the provisions in controversy, to the language of the contract as a whole, to the objects sought to be accomplished by the contract, to the circumstances surrounding its adoption, and to the case law interpreting similar provisions. We will also keep in mind that the contracts in issue were drafted and supplied by Pettibone, and that, as a rule, form contracts are to be construed against the furnishing party.

(Citations omitted.) The Court applies the foregoing rules to this case under diversity jurisdiction.

Beck argues that Paragraphs III.F.1 and IV.B.2 of the professional services contract are consistent, and the Court agrees. The Court cannot, however, agree with Beck's further argument that Sitka was obligated to defend, indemnify, and hold Beck harmless from *all* claims arising out of safety inspection work to the extent that the same might exceed Beck's compensation under the contract. This contention, in the Court's view, does not apply the foregoing rules for interpretation of contracts. Beck overlooks and renders meaningless important language contained in Paragraphs III.F and IV.B.

As argued by Beck, special provisions Paragraph B.2 contains an express undertaking on the part of Sitka to "indemnify [Beck] from all claims, liabilities, losses and expenses in excess of" Beck's compensation under the

agreement. Laying aside (for we need not decide this matter) the question of whether or not McKinley Nicholas died in the course of "safety inspection work", and indeed assuming that such was the case for the sake of discussion, the special indemnity provisions of Paragraph B.2 simply do not reach as far as Beck contends.

The subject of the special provisions is most certainly safety inspection work. However, it is very clear from the provisions of Paragraph B.1 that the scope of the pertinent special provisions was not *all* claims arising from safety inspection work, but rather a limited category of such claims. Plainly the parties in Paragraph B.1 intended to address the horrendous risks attendant to analyzing and offering opinions as to the safety, integrity, and stability of dams such as that which is a part of the Blue Lake project. But for the special provisions of Paragraph IV.B, the entirety of such losses would be upon Beck by virtue of the operation of Paragraph III.F.3 if the claim and loss were the result of Beck's sole negligence. Understandably, Beck was unwilling to assume the risk of catastrophic losses should the dam fail on account of a condition which it alone, in the application of generally accepted engineering practices, ought to have discovered and reported. Thus it is that Paragraph B.2 of the special provisions recognizes Beck's legal liability for the rendering of services "in accordance with generally-accepted engineering practices." However, in apportioning risks, the parties expressly agreed that "such liability", that is, Beck's losses deriving from a breach of the duty to report based upon "generally-accepted engineering practices," would be restricted to the amount of its compensation. Paragraph IV.B.2.

It is abundantly clear that the death of McKinley Nicholas was not the result of a failure of Beck to apply generally accepted engineering practices in analyzing or formulating opinions as to the integrity of the project in question. Indeed, the work of the decedent was obviously

preliminary to such analysis and opinion formation. The death of McKinley Nicholas is simply not the kind of claim to which the terms of the special provisions, taken as a whole, were intended to have application. This conclusion makes it unnecessary to consider Beck's other arguments. They become moot if, as the Court finds, Sitka was not obligated to indemnify Beck for the type of claim asserted by the estate of McKinley Nicholas.[2] As to this aspect of the case, there are no issues of material fact. Using the rules of interpretation set out above, the meaning of the professional services agreement is intrinsically plain and unambiguous. To the extent that factual matters extrinsic to the contract have been considered, they are not in dispute.

Sitka Motions for Summary Judgment

As noted at the outset, Sitka has filed two motions for summary judgment. That seeking a declaration of rights as between Sitka and Beck to the effect that Sitka does not owe Beck indemnity under the special provisions of the professional services contract between the parties is effectively decided by the Court's foregoing discussion. For the reasons set out above, Sitka does not owe Beck indemnity as to the death of McKinley Nicholas under Paragraph IV.B of the agreement between the parties.

By its second motion for summary judgment, Sitka seeks an affirmative declaration of rights as between it and Beck to the effect that Beck must indemnify Sitka on account of the liability claims stemming from the death of McKinley Nicholas. This motion is opposed by Beck by means of a legal memorandum and a statement of genuine issues.

Sitka contends that it is entitled to indemnification by virtue of subparagraph III.F.1 of the professional services

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[2]Beck would, of course, have been entitled to indemnity from Sitka had the Nicholas claim exceeded $5 million and if, as was the case, his death was not the result of Beck's sole negligence. Paragraph III.F.3.

agreement between the parties. That paragraph has been set out hereinabove. Subparagraph III.F.1 is completely unambiguous by itself. By means of subparagraphs III.F.1, III.F.2 and III.F.3, Beck and Sitka have effected a sharing or allocation of the risk of loss arising out of acts, errors, or omissions in providing services under the agreement. Simply put, the arrangement is that the duty to defend and indemnify is entirely upon Beck until such time as Beck or its insurance carrier has paid out a sum equal to the proceeds of applicable insurance plus the deductible under any such insurance. Thereafter, the entire duty to defend and and indemnify is upon Sitka.

In this case it is clear and undisputed that the applicable insurance has a policy limit of $5 million, an amount sufficient that the Nicholas claim does not exceed the "cap" or upper limit placed upon Beck's indemnification obligation under subparagraph III.F.1.

It is established on undisputed facts that the Nicholas claim arose out of acts or omissions of Beck in furnishing services pursuant to the agreement. Mr. Nicholas, although under contract to Sitka, met his death while performing services which were an integral part of the professional services agreement between Sitka and Beck. The information which Nicholas was to obtain through his diving efforts was necessary to the performance of Beck's services under the agreement. The work plan of the professional services agreement expressly provided that Beck would provide "technical guidance" to Sitka's diving contractor, Mr. Nicholas. These undisputed facts are in and of themselves a sufficient basis for invocation of Paragraph III.F.1 of the professional services agreement so as to require indemnity for Sitka from Beck.[3]

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[3]Although not discussed by the parties, no doubt because of the manner in which the arguments developed, it would appear that even if there were disputed facts asserted as regards the question of whether there were an act or omission of Beck in furnishing services pursuant

The Court has hereinabove addressed the question of the applicability of the special indemnity provisions contained in Paragraph IV.B of the professional services agreement. The language employed by the parties in Paragraph IV.B manifests a plain intent that the special provisions have application to Beck's analysis and reports of the structural integrity of the dam and a failure to employ generally accepted engineering practices in accomplishing such analysis and rendering reports. The paragraph is aimed at claims for engineering malpractice with regard to reports on the safety, integrity, or stability of the dam. The Nicholas claim falls within the plain language of Paragraph III.F.1, not Paragraph IV.B.2.

Beck argues that Paragraph III.H of the standard provisions of the professional services agreement relieves Beck of liability for injuries to non-Beck personnel at the project site and entitled it to an implied indemnity of claims of non-Beck personnel. This paragraph indeed provides that Beck shall not be responsible "for safety on . . . [the] project site". Paragraph III.H contains no express indemnity provision in favor of Beck.

While Beck's interpretation of Paragraph III.H might be permissible in the absence of express agreements as to indemnity, such interpretation or construction of the instant agreement is not reasonable. It is abundantly clear that the parties agreed that Beck would insure losses such as that presented by the Nicholas claim up to $5 million. Beck must necessarily have considered the cost of this insurance in negotiating the subject professional services agreement. Beck would have the Court interpret Para-

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to the agreement with Sitka, that issue would be precluded as regards further litigation by the verdict and judgment in the underlying Nicholas wrongful death litigation wherein it was determined that Beck was jointly and severally liable with Sitka for Mr. Nicholas's death. The latter necessarily involves a finding that Beck had committed some act of negligence in connection with its work and Mr. Nicholas' demise.

graph III.H so as to negate or reverse the unambiguous allocation of risk to Beck and its insurers for claims such as that of the estate of Nicholas as set out in Paragraph III.F. Beck's contention, rather than harmonizing the standard provisions of the professional services agreement, creates discord and renders clearly bargained-for undertakings conflicting and ineffectual. The Court will not so construe Paragraph III.H. There is no need to so construe Paragraph III.H. It has a plain meaning and purpose as to job safety duties, and is not on its face in conflict with Paragraph III.F.

Beck argues that Sitka has misinterpreted subparagraph III.F.1, contending that this provision limits Beck's liability to those losses arising directly as a result of the acts, errors, or omissions of Beck. The short answer to this contention is that Beck simply misreads the very language upon which it seeks to place emphasis. The critical language here requires that Beck indemnify Sitka as to all sums for which it is finally determined that Beck "has *legal liability* to other than [Sitka] arising out of any acts, errors, or omissions of [Beck] *in furnishing services*" (emphasis supplied). It is undisputed in this case that Beck has legal liability to the estate of McKinley Nicholas for the entirety of the Nicholas judgment and that Mr. Nicholas' death involved acts or errors related to Beck's performance of its agreement with Sitka. The Nicholas judgment is against Beck and Sitka jointly and severally. Mr. Nicholas died while diving in furtherance of remedial and inspection work included in the Beck work plan and while subject to technical guidance from Beck.

In making the foregoing argument, Beck relies upon *City & Borough of Juneau v. Alaska Electric Light & Power Co.*, 622 P.2d 954 (Alaska 1981). That case is clearly distinguishable from the present case. The indemnification language provided that Alaska Electric would indemnify Juneau from any judgment "*resulting from negligence on the part of the company . . . .*" 622 P.2d at 955, emphasis

in original. Had Beck in its agreement with Sitka undertaken to indemnify Sitka for Beck's own negligence, then the indemnity obligation in this case would amount to the 40% negligence which was allocated by the jury in the Nicholas case to Beck. However, such simply was not the agreement as between Sitka and Beck. In plain English, Beck undertook to indemnify Sitka as to any sum for which Beck became "legally liable" and, as set out above, that is the entire Nicholas judgment, not 40% of it.

Finally, Beck argues that Sitka's claim for indemnity has not yet accrued.

This case presents the very kind of situation where declaratory actions are appropriate; and indeed, it is Beck which commenced one of these consolidated cases for the purpose of securing an adjudication of rights and obligations between it and Sitka under the professional services agreement. It is abundantly clear that there was a *bona fide* case or controversy between Beck and Sitka as to who owed a defense and indemnity to whom. It is, of course, true that the amount of indemnity owed Sitka by Beck cannot be determine until the appeal of the Nicholas judgment is decided. This is no reason to delay a declaration of Sitka's rights and Beck's obligations under the professional services agreement.

Conclusion

Based upon the foregoing discussion, Beck's motion for summary judgment is denied. Sitka's motion for summary judgment on the question of its obligation to indemnify Beck is granted, as is Sitka's motion for summary judgment that it is entitled to indemnification from Beck. Counsel for Sitka shall prepare, serve, and file an appropriate declaratory judgment in accordance herewith.

DATED at Anchorage, Alaska, this 7th day of April, 1986.

/s/H. Russel Holland
United States District Judge

cc: LeRoy Barker (ROBERTSON, MONAGLE)
LYNCH, FARNEY & CROSBY
David Thorsness (HUGHES, THORSNESS)
Ronald Bliss (BRADBURY)
Randolph Hunter (CAMAROT)

APPENDIX E

R. W. BECK AND ASSOCIATES

Engineers and consultants

PROFESSIONAL SERVICES AGREEMENT

Date January 26, 1983 W.O. No. HH-1521-HG4-AA
CLIENT City and Borough of Sitka
P.O. Box 79
ADDRESS Sitka, Alaska 99835

PROJECT Blue Lake - Remedial and FERC Safety Inspections - Phase I

Part I—Scope of Services

The Consulting Engineer (Beck) in conjunction with remedial work and completion of uncompleted portions of FERC Safety Inspections shall perform engineering services for the City and Borough of Sitka (Client) in accordance with the Scope of Services described in Exhibit A attached.

Part II—Payment

For services furnished, the Client shall pay R. W. Beck and Associates, Consulting Engineer, upon submission of monthly invoices, an amount equal to the actual hours of services furnished multiplied by the product of the Consulting engineer's established hourly salary costs, which include allowance for personnel benefits, and a factor of 2.30

In addition, the Client shall reimburse the Consulting Engineer each month at cost for all out-of-pocket expenses directly chargeable to the work, at cost plus 10% for services of Special Consultants and Subcontractors and at the Consulting Engineer's then current rates for computer use and reproduction services.

On the basis of the Scope of Services outlined in this Agreement, the estimated total amount to be paid by the Client for services furnished and expenses reimbursed will be approximately $28,000.00. The maximum amount to be paid by the Client under this Agreement shall not exceed the amount estimated above without prior written authorization of the Client, and the Consulting Engineer shall not be required to furnish services or incur expenses for which the total charges to the Client exceed such maximum amount.

Part III—Standard Provisions (see following pages)

Part IV—Special Provisions see attached

Approved for CLIENT:

By: Virtue of Signed Master Work Order

Approved for CONSULTING ENGINEER

By: /s/ Donald E. Melnic

Registered Professional Engineer State of Alaska

By: /s/ Ronald E. Bawes

Vice President

PART III - STANDARD PROVISIONS

III.A. Consulting Engineer's Organizations

R. W. Beck and Associates is a partnership and R. W. Beck and Associates, Inc. is a corporation owned and controlled by the partnership. Both entities are organized and operating under the laws of the State of Washington. It is expressly agreed that the partnership may be changed by addition or reduction in the number of the partners or redistribution of the partnership interests and this Agree-

ment may be assigned to the partnership or to the corporation. The Consulting Engineer may assign the compensation from this Agreement to any other entity.

III.B. Professional Services

The Consulting Engineer shall be consultant and advisor to the Client as an independent contractor and shall not be an employee, agent or representative of the Client. The Consulting engineer represents that the services furnished under this Agreement will be in accordance with generally accepted professional practices. Any estimate of cost of equipment, construction, ownership or operation furnished by the Consulting Engineer shall be the Consulting engineer's opinion based upon its professional judgment and experience. The Consulting Engineer makes no other representation or warranty, express or implied.

III.C. Change in Scope and Delays

1. If the provisions for payment in this Agreement provide for a fixed fee or a maximum payment for services, such fee or maximum is for the Scope of Services described in the Agreement. If the Scope of Services is modified so that more or less work or time is required, and such modification is approved by the Client and the Consulting Engineer, the fee or maximum and the time shall be equitably adjusted.

2. In the event of delays in or failures of performance of the Consulting Engineer caused by circumstances beyond its control, the Consulting Engineer's fee or maximum and the time allowed shall be equitably adjusted, and such delays or failures shall not constitute a default or give rise to any claim against the Consulting Engineer.

III.D. Relating to Payment

1. The consulting Engineer's "Salary Costs" allow for basic salary and personal benefits, including: life, accident and medical insurance; sick leave, holiday and vacation pay; social security, workmen's compensation, unemploy-

ment compensation and pension retirement contributions; and similar employment-related costs. Basic salary per hour shall be twelve times current monthly salary for employees or current monthly drawings in lieu of salary for partners, exclusive of overtime, bonus or other profit participation payments, divided by 2,080.

2. The Consulting Engineer's "Out-of-Pocket Expenses" are those expenditures made by the Consulting Engineer, other than Salary Costs, costs of reproduction and computer facilities and costs of Special Consultants and Subcontractors, which are directly chargeable to the Project and which would not otherwise have been incurred. Such expenditures include, but are not limited to, transportation, lodging, subsistence, communications, liability and other insurance premiums when required by the Client in addition to the types and amounts-currently carried by the consulting Engineer, taxes other than those levied on the profits or net income of the Consulting engineer, equipment rentals and repair, and special mailing, forms, materials and supplies required during the progress of the work. Reimbursement for out-of-pocket expenses shall be an amount equal to the cost thereof.

3. In event of the inability or failure of the Client to pay as agreed, interest commencing sixty days after the date of invoice shall be paid by the Client to the Consulting Engineer on the last day of each month on all unpaid amounts due the Consulting Engineer at the interest rate for borrowed funds then currently available to the Consulting Engineer at the Rainier National Bank of Seattle.

III.E. Insurance

The Consulting Engineer shall maintain in effect, to the extent that such insurance is available at reasonable cost, employer's liability, professional liability, comprehensive general liability (bodily injury and property damage) and comprehensive automobile liability (bodily injury and property damage) insurance with respect to employees and ve-

hicles of the Consulting Engineer assigned to the prosecution of work under this Agreement in a maximum amount not less than $5,000,000 and statutory workmen's compensation protection. Upon written request, the Consulting Engineer will supply to the Client a description of each such insurance policy currently in effect, specifying the amount thereof. The Consulting Engineer will obtain and thereafter maintain in effect, if reasonably available, such additional insurance as may be requested by the Client, the cost of which shall be reimbursed by the Client.

III.F. Liability

1. The Consulting Engineer shall defend, indemnify and hold harmless the Client and its governing board, officers, agents, employees and servants from all sums for which it is finally determined that the Consulting Engineer has legal liability to other than the Client arising out of any acts, errors or omissions of the consulting Engineer in furnishing services pursuant to this Agreement; provided, however, such defense, indemnification and hold harmless shall not exceed the sum of the amounts paid to or on behalf of the consulting Engineer as the proceeds of any applicable insurance plus the deductible amount of such insurance.

2. The client will limit any and all claims of the Client against the Consulting Engineer, its partners, officers, agents, employees or servants, to an amount not to exceed (a) the amounts paid to or on behalf of the Consulting Engineer as the proceeds of any applicable insurance plus the deductible amount of such insurance or (b) $250,000, whichever is greater.

3. In partial but specific consideration of the execution of this Agreement by the Consulting Engineer, it is agreed that for amounts not reimbursed by nor within the deductible amount of the insurance maintained by the Consulting Engineer, the Client shall indemnify the Consulting Engineer, its partners, officers, agents, employees and

servants against all expense or liability of any kind arising out of any claim for loss of life, bodily or personal injury, property damage or other loss from any cause related to the furnishing of the services covered by this Agreement, except the sole negligence of the Consulting Engineer.

4. The Client and the Consulting Engineer shall not be liable to each other in any event for consequential damages, including but not limited to: interest (except as otherwise provided); loss of anticipated revenues, earnings or profits; increased expense of operations; or loss by reason of shutdown or non-operation due to late completion or otherwise.

5. In the event of any payment of any kind by or on behalf of either party to this Agreement under the provisions of this paragraph entitled "Liability" to or on behalf of the other party, the paying party shall be surrogated to the extent of the amount of such payment to all rights and remedies of the other party against any third party regarding any matter to which such payment is pertinent.

III.G. Suspension or Termination of Services

The Client or the Consulting Engineer may suspend or terminate any or all services covered in this Agreement at any time upon written notice in which event the Client shall pay the Consulting Engineer upon submission of invoices for all services rendered and expenses incurred to the effective data of such suspension or termination.

III.H. Contractor's Performance and Safety

The Consulting Engineer shall not be responsible: for safety on the Client's premises or project site, except for the safety of personnel of the Consulting Engineer, its Special Consultants and Subcontractors; for providing or assuring a safe place for the performance of the contractor's work; for safety precautions, programs or equipment; for construction means, methods, techniques, sequences or

procedures; nor for contractor's failure to perform the work in accordance with the Contract Documents.

III.I. Disposition of Documents

Upon completion of the services provided under this Agreement, the Consulting Engineer shall deliver to the Client one copy of all Reports, Specifications and Contract Documents and one transparency of each of the Drawings. The originals of all Reports, Specifications, Drawings and Contract Documents shall be retained by the Consulting Engineer and upon request by the Client, the Consulting Engineer will furnish copies to the Client at actual cost of duplication and mailing. If such Reports, Specifications, Drawings or Contract Documents or reproductions thereof, or any other items relating to the services of the Consulting Engineer are changed in any way or used by the Client for any other project or purpose, the Client shall indeminify, defend and hold harmless the Consulting Engineer from all loss, damage, liability or expense arising out of such changes or use.

III.J. Equal Opportunity

The Consulting Engineer will not knowingly discriminate against any employee or applicant for employment because of age, race, color, religion, sex, national origin, marital or veteran status or physical handicap. The Consulting Engineer will take affirmative action to the end that applicants are employed, and that employees are treated during employment, without such discrimination.

III.K. Severability and Headings

1. If any part of this Agreement, including, but not limited to, any provision, paragraph, clause, phrase or words, is found to be in conflict with applicable laws, such part shall be inoperative, null and void insofar as it is in conflict with said laws, but the remainder shall be given full force and effect.

BEST AVAILABLE COPY

2. The descriptive headings used in this Agreement have been inserted for convenience of reference only and shall in no way modify or restrict any of the terms and provisions of this Agreement.

III.L. Notice

All notices relating to this Agreement shall be in written form delivered in person or by Registered or Certified United States Mail, postage prepaid, to the Consulting Engineer or to the Client to the attention of its chief executive officer at the last business address of the principal office of the addressee known to the sender.

- END OF PART III -

PART IV—SPECIAL PROVISIONS

A. With Reference to PART II - PAYMENT, the following SPECIAL PROVISIONS shall apply:

To provide for separate accounting, charges for services under this Agreement will be accrued in separate sub-work orders for Phase I and Phase II services.

Billings for Phase I services will be accrued under sub-work order HH-1521-HG4-AA. The estimated amount for services to be provided for Phase I of this Agreement is $28,000, and this amount will not be exceeded without the prior written authorization of the Client.

Billings for Phase II services will be accrued under sub-work order HH-1521-HG4-AB. The estimated amount of services to be provided for Phase II will be determined by the Engineer following the completion of Phase I. Phase II services will not be initiated until the final scope and amount are agreed upon and separately authorized in writing by the Client. Once authorized, billings will not exceed the authorized amount without prior written authorization of the Client.

Billings for services will be made at the Engineer's then current salary and expense levels, based on actual time and out-of-pocket expenses devoted to the services, as reflected on computer ledgers accompanying each invoice.

B. With Reference to PART III - STANDARD PROVISIONS, Paragraph III.F. Liability, the following SPECIAL PROVISIONS shall apply to the Safety Inspection Work Only:

1. *Scope* - In performing the safety inspection, the Consulting Engineer will base its analyses and opinions on generally-accepted engineering practices. The Client understands, however, that for the compensation herein provided, the Consulting engineer cannot expose itself to liabilities disproportionate to the nature and scope of Con-

sulting Engineer's services or the compensation payable to it hereunder. Therefore, it is understood and agreed the Consulting Engineer's services are limited to the inspection, analysis, and preparation of reports required by the Client and that under no circumstances shall the Consulting Engineer be considered a guarantor of the safety, integrity or stability of the projects as to which said inspection, analysis and reports are made by the Consulting Engineer.

2. *Indemnity* - It is further agreed that although the Consulting Engineer in the rendition of its services pursuant to the provisions hereof has the legal liability of an independent engineering consultant to render said services in accordance with generally-accepted engineering practices, such liability for all damages or liabilities of any kind or nature, including but not limited to damages to the property of the Client or others and injury to or death of any persons, as a result of any act or omission of the Consulting Engineer, whether or not due to the Consulting Engineer's fault or negligence or breach of this Agreement, arising out of the projects of the entering into or performance of this Agreement, shall in no event exceed the aggregate of the compensation of the Consulting Engineer, and the Client shall and hereby does agree to indemnify, defend and hold harmless the Consulting Engineer and its agents, employees and consultants, from all claims, liabilities, losses and expenses in excess of such compensation.

EXHIBIT A

SCOPE OF SERVICES

BLUE LAKE PROJECT
REMEDIAL WORK AND FERC SAFETY INSPECTIONS

1. GENERAL

The general scope shall consist of furnishing consulting engineering services for completing remedial work and safety inspections in reference to the recommendations resulting from safety inspections made in 1974 (Second Part 12) and 1979 (Third Part 12), to the City and Borough of Ssitka (Client) by R. W. Beck and Associates, Inc. (Engineer) for the Blue Lake Project (Project), all as more completely described below.

2. SCOPE OF SERVICES

The Engineer will provide consulting engineering services in relation to work required to remedy deficiencies at the Project which were identified during the five year FERC Safety Inspections performed in 1974 and 1979, and will perform aspects of inspection which could not be performed previously as a result of the deficiencies; all as follows:

a. Phase I

Phase I will consist of the following:

(1) Dam

(a) The Engineer will prepare technical specifications for purchase order-type contracts to perform Underwater Inspection of the Howell-Bunger Valve Trashrack, Dewatering the Plunge Pool, and performing a Profile Survey of the Plunge Pool. The Client will place and administer these contracts.

(b) Underwater inspection (by the Diving Inspection Contractor) will be performed to determine the extent of

debris blocking the Howell-Bunger valve trashrack. The Engineer will be present at site while this inspection is performed.

(c) The Engineer will inspect the Howell-Bunger valve and its operating machinery, to determine if there are any obvious deficiencies that would prevent operation of the valve.

(d) At Client's option, the Engineer, while inspecting the Howell-Bunger valve, will examine the feasibility of adding a system to control the Howell-Bunger valve from the high ground above the dam.

(e) The plunge pool will be dewatered by the Client's Contractor.

(f) The Client's Survey Contractor will perform a profile survey of the dewatered plunge pool, and the Engineer will inspect the dewatered plunge pool and the protective cribbing at the toe of the dam and review the survey data obtained. The Engineer will provide a report suitable for submittal to FERC on the survey and inspection.

(2) Intake

(a) In conjunction with Task a(1)(a), above, the Engineer will include specifications for Underwater Inspection at the intake. The scope will consist generally of the work described in Task a.(2)(d).

(b) The intake gate will be raised above lake level, and the Engineer will inspect the condition of the gate seals, rollers, and structure; at the same time, the Engineer will verify the requirement and dimensions for installing the equalizer sheave and repairing the rails and air vent pipe.

(c) The Client will coordinate with ALP regarding scheduling closure of the intake gate.

(d) Underwater inspection by Diving Inspection Contractor will be performed to determine the extent of debris

in front of the intake. The same contractor will then temporarily remove a section (or a sufficient number of bars) from the trashrack to gain access to the gates. The same contractor will then perform an underwater inspection of the condition of the gates, and will identify sources of leakage into the intake (using dye or hand-held flowmeters). The same contractor will then, as far as practicable, caulk the leaks with oakum or an equivalent material to temporarily diminish or, to the extent practicable, stop the leakage. The Engineer will be on-site to provide technical guidance to the Diving Inspection Contractor.

(e) Provided the leakage can be sufficiently reduced to allow access to the tunnel, the engineer will perform an inspection of the dewatered intake and all water conduits including the branch to the ALP Mill. If inspection of the dewatered intake and conduits cannot be performed at this time, it will be performed in Phase II or as soon thereafter as ALP's operations allow. The Engineer will provide an inspection report suitable for submittal to FERC.

(3) Powerhouse

Conduit pressure gage readings will be obtained for incremental outputs of the turbine units both before and after flow begins to the ALP Mill, and without releases for fish. At the Client's option, the Engineer will attend the test, record gage readings, analyze results, and provide a report of results.

(4) Determining Phase II Scope

Following completion of all Phase I field activities and associated analyses, the Engineer will prepare a detailed scope of work, work plan, and cost estimates, and discuss these (by phone) with the Client to agree on Phase II activities.

b. Schedule

The Engineer and the Client will collaborate to produce an acceptable detailed schedule for completion of the work during the February-July 1983 period.